F.M.S. REPORTS

RAMASAMY CHETTIAR v. MEYAPPA CHETTIAR

[O.C.J. (Terrell Ag. C.J.) July 7, 1936]
[Selangor Civil Suit No. 279 of 1935]

Practice — Civil Procedure Code (Cap. 7), ss.3, 64 to 67 — Service of summons out of the Federated Malay States.

In view of the express provisions of section 66(i) of the Civil Procedure Code (Cap. 7) leave is required for the service of a summons outside the Federated Malay States.

Although no procedure is laid down as to the form in which an application for leave should be brought there is nothing in the Civil Procedure Code to suggest that an order is not necessary.

Decision in *Mohamed Kassim* v. *Maricar,* 5 F.M.S.L.R. 30 considered.

M. N. Cumarasami for the plaintiff.

Defendant absent.

Cur. Adv. Vult.

Terrell Ag. C.J.: The plaintiff n this case applies for judgment in default of appearance. The summons accompanying the plaint gives the address of the defendant as Karaikudi, Ramnad District, South India, outside the jurisdiction of the Court.

The history of service out of jurisdiction in the Federated Malay States is as follows:—

As is well known, civil procedure in the Federated Malay States was originally based on that of the High Court of India, and the Indian Code did not provide, and still does not provide, for service out of the jurisdiction apart from service in different parts of India and Burmah (see Indian Ordinance V, and *Mulla,* 9th edn., pp. 464 *et seq.*). In the 1902 Federated Malay States Civil Procedure Code similar provision was made in section 79 for service in other parts of the Federated Malay States and in the Colony, such provisions corresponding to the Indian provisions as regards service in other parts of India. But in addition section 78 provided for service on a defendant who resided neither in the Federated Malay States nor in the Colony. This assumption of an extraordinary jurisdiction was not qualified in any way, and apparently a plaintiff was entitled to sue a defendant in the Federated Malay States, irrespective of the nature of the claim, the abode of the defendant or the place where the cause of action had arisen.

In England service out of the jurisdiction had been allowed in any suit in equity since 1860, by virtue of Order 27 of the Consolidated Orders of 1860. In every case, however, an order was required, and such order was not made as a matter of course — see *In re Busfield,* (1886) 32 Ch. D. 123, 126, 127. In Common Law matters, the procedure was regulated by section 18 of the Common Law Procedure Act of 1852. The procedure in England is now regulated by Order 11, rule 4 and Order XI of the Rules of the Supreme Court as regards both Chancery and Common Law matters. Leave is always required, and the granting of such leave is discretionary — *Lenders* v. *Anderson,* (1883), 12 Q.B.D. 50, 54. Order 11, rule 4 provides that —

"no writ of summons for service out of the jurisdiction..... shall be issued without the leave of the Court or a Judge."

And Order XI provides for service out of the jurisdiction. It is further provided by English Order 55, rule 15 that such applicant must come before the Judge personally.

An important change was introduced in the Federated Malay States by the Civil Procedure Code of 1918. The issue and the service of summonses out of the jurisdiction were then specifically provided for by section 63 (section 64 of the present Code) and the following sections. The present section 64 reads as follows:—

"No summons for service on a defendant out of the Federated Malay States shall be issued by any Court without the leave of the Supreme Court or a Judge thereof."

This appears to be the equivalent of English Order 11, rule 4, sections 65 and 67 providing for the procedure mittees are unanimous in their objection. It is true on the application for leave to issue the summons. There is no rule in the English Orders and Rules corresponding to section 65, but the practice indicated follows closely that adopted in England upon an application for leave to issue a writ for service out of the jurisdiction — see *Yearly Practice,* 1936, p. 101. Section 67 is an adaptation of Order 11, rule 4 which gives the procedure on an application not to issue the writ, but to serve it.

Wedged in between sections 65 and 67 is section 66, which provides for the cases in which service out of the jurisdiction is to be allowed, corresponding to English Order 11, rule 1. Whereas, however, in the English Orders and Rules the procedure in the application for leave to serve out of the jurisdiction is laid down by Order 11, rule 4, no procedure is laid down in the Federated Malay States Code, as section 67 is confined to the application for leave to issue the summons only. When leave to serve out of the jurisdiction is given, a most important consideration is the length of time within which the defendant is to enter an appearance. This is provided for in English Order 11, rule 5 and in Order 11, rule 5 of the Colony Orders and Rules. Any such provision [272] is, however, [272] omitted from the Federated Malay States Code, though in practice the Registrar does limit a time by virtue of 1932 rule 1, sub-rule 9. It is also to be observed that by virtue of rule 1, sub-rule 44(i)(c) the jurisdiction to allow service out of the jurisdiction can be exercised by the Registrar.

It will be seen, therefore, that the Federated Malay States provisions of 1918 were a somewhat inadequate adaptation of the English provision on the subject. The one point, however, which appeared to emerge quite clearly was that as a result of the 1918 Code, the issue of a summons for service out of the jurisdiction could not be effected automatically, as it was under the 1902 Code, by merely stating that the defendant had a foreign address. It was obviously intended that such summonses should only be issued and served in certain specified cases, and that the leave of the Court should be obtained in every case.

Unfortunately, however, the matter was not allowed to rest even there, as in the case of *R.E. Mohamed Kassim & Co.* v. *M.T.S. Maricar and Another,* 5 F.M.S.L.R. 30, Sproule J. held that section 64 of the Civil Procedure Code (section 63 of the 1918

Code) did not apply to the Supreme Court. I should have thought myself that 'any Court' means what it says, and must necessarily include the Supreme Court. The decision also appears to me to be entirely inconsistent with the objects of the 1918 Code in introducing rules for issue of summons and service out of the jurisdiction, which were conspicuously absent in the 1902 Code. The decision has, however, been acted upon for many years, and I accept it out of respect rather than from conviction.

I presume also that the legislature had the decision in mind when it was declared by the 1933 amendment to the Civil Procedure Code (now section 3) that section 65 did not apply to the Supreme Court. As I have said, sections 65 and 67 provide for the procedure on an application for leave to issue the summons. If no leave is required, it follows that an indication of the procedure for obtaining such leave is superfluous. It is all the more remarkable, therefore, that sections 64 and 67 are not mentioned in section 3, and accordingly must still be deemed to apply to the Supreme Court, although there is no possible occasion on which such procedure could be invoked.

Apart, however, from the question of the issue of the summons it is abundantly clear that leave is required for service out of the jurisdiction. Section 66(i) says so in so many words. It is true that owing to the faulty wording introducing section 67 no procedure is laid down, but this is merely an inconvenience, and cannot affect the express provisions of section 66(i). Such leave is normally granted by an order made in pursuance of an application, and there is nothing in the Code to suggest that an order is not necessary. On the contrary, section 66(ii) states what directions the order is to contain, and section 68, which provides that no order shall be made for service out of the jurisdiction in cases of summary procedure, makes it quite clear that an order is contemplated. In the case decided by Sproule J. orders were obtained from the Registrar giving leave to serve the defendants in Bangkok and in India, and this has always been the rule in England, where applications for leave to issue the writ and serve it out of the jurisdiction are generally made at one and the same time — see *Yearly Practice,* 1936, p. 99, notes to Order 11, rule 4.

In the present case the plaintiff, relying on the authority of the case cited above, issued his summons giving the address of the defendant in India. He then wrote to the Registrar asking for the summons to be served, presumably in accordance with the provisions of section 86, and the Registrar proceeded to serve it. Section 86, however, which was introduced by an amendment in 1933, does not extend the jurisdiction to serve, which is limited by section 66. It merely provides the manner in which service may be effected upon a defendant residing in India or Ceylon, when once leave to serve out of the jurisdiction has been given.

My conclusion is, therefore, that quite apart from the question of the issue of the summons, the plaintiff has been at fault in not obtaining an order for service out of the jurisdiction.

The proceedings since the issue of the summons are accordingly a nullity, and the application for judgment in default of appearance must be refused.

TAN HOE SENG v. PUBLIC PROSECUTOR

[A. Cr. J. (Aitken J.) July 3, 1936]
[Perak Magistrate's Criminal Appeal No. 34 of 1936]

Minor Offences Enactment (Cap. 46), s.35(i) — Possession of property stolen or fraudulently obtained — Reasonable suspicion by the police — Application of s.113 of the Criminal Procedure Code (Cap. 6).

A police officer acting under section 35(i) of the Minor Offences Enactment, (Cap. 46), must have reasonable suspicion at the time he so acts that the property in possession of the accused has been stolen or fraudulently obtained.

[273] Any explanation given by the accused to the police can be used in evidence against him because the provisions of section 113 of the Criminal Procedure Code, (Cap. 6), have no application to a prosecution under section 35 of the Minor Offences Enactment. [273]

G. Terrell for the appellant.

I. W. Belloch (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Aitken J.: On the 7th of May, 1936, the appellant was convicted by the Magistrate, at Parit, of having in his possession at Teluk Bakong, on the 12th of March, 1936, 18½ gunny sacks of rubber lumps which might be reasonably suspected of being stolen or fraudulently obtained, and of failing to account satisfactorily how he came by the same. The charge was laid under section 35(i) of the Minor Offences Enactment, and on conviction the appellant was fined $10 with 10 days' rigorous imprisonment in default of payment, and the rubber was confiscated and ordered to be destroyed. From this conviction the appellant has appealed, and as his appeal raises several interesting points, it is necessary to set out the facts of the case so far as they were disclosed in the evidence led before the learned Magistrate, they lie within a narrow compass.

On the 12th of March, 1936, the appellant was acting as the "Chin Chew" or master of a motor launch named the *Seri Blanja,* which plies for hire between Lambor and Telok Anson. He had only assumed charge of the same two days previously, and was acting quite temporarily during the absence of the regular Chin Chew owing to illness. In point of fact the period during which he acted as Chin Chew or master of this launch only extended to one week, so that he seems to have been distinctly unfortunate in receiving a visit from the police on the 12th of March whilst the *Seri Blanja* was alongside the jetty at Telok Bakong. The police, who appear to have been acting "on information received," found 18½ bags of rubber lumps lying quite openly on the deck of the launch, but none of these bags bore any marks, or labels, or other indications, of ownership, and the appellant could produce no coupons, or export licence or other document of whatsoever nature relating to them. The accused was asked whence he got the rubber, and he gave the names of eight Malays living in or near Bota. At the request of the police he pointed out each of